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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California; ORETTA SEARS, Deputy District Attorney of the County of Orange, State of California; DUDLEY D. GOURLEY, Chief of Police of the City of Buena Park, County of Orange, State of California; ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, Officers of the Police Department of the City of Buena Park, County of Orange, State of California,

Appellants,

vs.

VINCENT MIRANDA, doing business as WALNUT PROPERTIES; and PUSSYCAT THEATRE HOLLYWOOD, a California corporation,

Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO DISMISS OR AFFIRM.

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Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO DISMISS OR AFFIRM.

The Appellees move the Court to dismiss the appeal herein on the ground that the appeal is not within the jurisdiction of this Court because not taken in conformity with statute or rules of the Court or, in the alternative, to affirm the judgment of the District Court on the ground that the judgment, as amended on September 30, 1974, was clearly correct and that it is manifest upon the record herein that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Opinions Below.

Appellants have appealed from a judgment of the United States District Court for the Central District of California entered on July 4, 1974. The unreported Memorandum Opinion of the District Court and the Judgment appear as Appendix "A" to Appellants' Jurisdictional Statement. The unreported Supplemental Memorandum Opinion filed by the District Court on September 30, 1974, appears as Appendix "A" hereto. The Amendment to Judgment entered by the District Court on September 30, 1974, amending the judgment entered June 4, 1974, from which this appeal was taken, appears as Appendix "B" hereto.

Jurisdiction.

It is respectfully submitted that the appeal herein is not within the jurisdiction of this Court and is not taken in conformity to statute or to the rules of this Court. As discussed hereafter, reliance upon 28 U.S.C. §1253 as purportedly conferring jurisdiction on this Court of the appeal herein is unwarranted.

Questions Presented.

1. Whether the appeal should be dismissed as premature because Appellants filed Notice of Appeal to this Court while their timely motions to amend the judgment entered June 4, 1974, were pending, and where subsequently the judgment was amended as to a matter of substance on September 30, 1974.

2. Whether an appeal from a judgment of a three-judge District Court granting a declaratory judgment invalidating a state statute where no injunctive relief was granted against the enforcement of the statute is

within the jurisdiction of this Court, or whether such appeal lies only with the Court of Appeals.

3. Whether the judgment of the District Court, as amended on September 30, 1974, was correct, where the District Court found that Appellants, law enforcement authorities, acting in bad faith and for the purpose of harassment, seized four copies of a motion picture film from Appellees' theatre over a period of only two days in violation of this Court's ruling in *Heller v. New York,* 413 U.S. 483, where the prosecution and defense in the resulting state criminal prosecution stipulated that all four copies were identical and that only one copy was needed for trial, and where the District Court accordingly ordered Appellants to return to Appellees three of the four copies of the films seized.

4. Whether the judgment of the District Court, as amended on September 30, 1974, was correct in declaring the California obscenity statutes to be in violation of the constitutional requirements enunciated by this Court in *Miller v. California,* 413 U.S. 15, where the District Court found that the state obscenity statutes, on their face, are not limited to specifically defined sexual conduct, and where the District Court found that no limiting authoritative construction of the statutes ever had been rendered by the state appellate courts.

Statutes Involved.

The provisions of 28 U.S.C. §§2281 and 1253, the sections upon which Appellants rely to support their jurisdictional claim are as follows:

> §2281. An interlocutory or permanent injunction restraining the enforcement operation or execution of any State statute by restraining the action

of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

§1253. Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

The pertinent provisions of the state obscenity statutes, California Penal Code §§311 and 311.2, appear in Appendix "E" to Appellants' Jurisdictional Statement.

Statement of the Case.

On November 29, 1973, Appellees filed their Complaint in the United States District Court for the Central District of California, invoking the jurisdiction of that Court under 28 U.S.C. §§1331 and 1343. The Complaint alleged that Appellants, law enforcement authorities of the City of Buena Park and the County of Orange, State of California, had acted to deprive Appellees, the owner of a theatre in Buena Park, his property holding company, and the theatre corporation, of certain constitutional rights (42 U.S.C. §1983). The Complaint alleged that Appellants, acting under color of the state obscenity statutes, seized four copies of a

film from Appellees' theatre within the space of two days, prior to any judicial determination in an adversary proceeding that the film was obscene. It was alleged that the multiple seizures of the film, together with seizures of all cash receipts present at the theatre, were undertaken for the purpose of harassing Appellees and suppressing exhibition of the film to the public. The Complaint prayed for a declaratory judgment that the state obscenity statutes violated the First and Fourteenth Amendments to the United States Constitution, and for the return of the seized property. A detailed statement of the facts as found by the District Court appears in the Court's Memorandum Opinion (Appendix "A" to Appellants' Jurisdictional Statement, pp. 1-5).

Thereafter, a three-judge court was convened which Court, on June 4, 1974, entered the judgment from which Appellants have taken this appeal. The District Court entered a judgment declaring the California obscenity statutes to be in violation of the mandate of the United States Supreme Court as set forth in *Miller v. California,* 413 U.S. 15, and ordered Appellants to return to Appellees the property seized from Appellees' theatre.

On June 14, 1974, Appellants filed timely motions to amend and alter the judgment and for other relief pursuant to Federal Rules of Civil Procedure, Rules 59(a) and (e), and Rules 60(a) and (b). While the motions were still pending before the three-judge court, Appellants filed Notices of Appeal to this Court on July 5, 1974.* Appellants Hicks and Younger filed Applications for Stays of the June 4 Judgment, which

*Appellants also filed Notices of Appeal to the Court of Appeals for the Ninth Circuit.

were denied by Mr. Justice Douglas on August 8 and 10, 1974.

On September 30, 1974, the District Court filed a Supplemental Memorandum Opinion (Appendix "A" hereto) setting forth its findings and conclusions with respect to Appellants' post-trial motions. Also on September 30, 1974, the District Court entered an amendment to the Judgment entered June 4, 1974 (Appendix "B" hereto). The Amendment deleted Paragraph 2 of the June 4 Judgment, requiring the return to Appellees of all four seized films and cash and added a new Paragraph 2 to read as follows: That "The defendants [Appellants] shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs [Appellees] three of the four film prints seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park."

ARGUMENT.

1. The appeal herein from the judgment of the District Court entered June 4, 1974, is premature and, it is submitted, should be dismissed. Prior to filing their Notices of Appeal, Appellants filed timely motions to, *inter alia,* amend or alter the judgment entered June 4, 1974. The motions raised matters of substance, not form. Thereafter, on September 30, 1974, an amendment to the judgment was entered substantively changing the original judgment. Where a timely motion under Rule 59 of the Federal Rules of Civil Procedure has been made and not disposed of, the judgment is not final. Accordingly, the subsequent filing of a notice of appeal is a nullity and does not deprive the trial court of power to rule on the motion. Where the motion is not addressed to mere matters of form but rather raises questions of substance, *e.g.,* if it seeks reconsideration of basic findings of fact and conclusions of law, the purported appeal is premature and should be dismissed. See, *United States v. Crescent Amusement Company,* 323 U.S. 173, 177-178; *Turner v. HMH Publishing Company,* 328 F.2d 136 (5 Cir. 1964); *Healy v. Pennsylvania Railroad Company,* 181 F.2d 934 (3 Cir. 1950); *Tucker v. Reading Company,* 53 F.R.D. 453 (D.C. Pa. 1971); 11, Wright and Miller, Federal Practice and Procedure §2821; 9, Moore, Federal Practice, §203.11, n.14.

2. An appeal from the judgment of the District Court, as amended on September 30, 1974, is not within the jurisdiction of this Court, but lies only with the Court of Appeals to which Appellants also have filed Notices of Appeal. In their Jurisdictional Statement, addressed only to the District Court's judgment entered

June 4, 1974, Appellants argued in essence that this Court has jurisdiction over the appeal by virtue of that portion of the June 4 judgment ordering the return to Appellees of all four copies of the film seized from Appellees' theatre. Relying upon *Perez v. Ledesma,* 401 U.S. 82, Appellants appear to contend that the order to return all copies of the seized film operated to terminate a pending state criminal prosecution and, accordingly, constituted "an order granting . . . [a] permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges," within the meaning of 28 U.S.C. §1253. However, the amendment to the June 4 judgment, entered September 30, 1974, deleted that portion of the original judgment relied upon by Appellants as conferring jurisdiction upon this Court to hear the appeal, and instead amended the judgment to provide that "The defendants [Appellants] shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs [Appellees] three of the four film prints seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park." [See, Appendix "B" hereto].

In its Supplemental Memorandum Opinion [Appendix "A" hereto], the District Court noted that the prosecution and defense in the state criminal prosecution arising out of the seizures had stipulated that all four copies of the film seized from Appellees' theatre were identical and that only one copy was needed for trial. As a result, the amendment to the judgment permitting Appellants to retain one copy of the film forecloses any contention that the District Court's judgment as amended will terminate or disrupt any state criminal

prosecution. Aside from the order to return three of the four copies of the film seized, the judgment of the District Court grants only declaratory relief with respect to the state statute involved. 28 U.S.C. §1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone, but such appeal lies only with the Court of Appeals. *Gerstein v. Coe,* 94 S.Ct. 2246; *Gunn v. University Committee,* 399 U.S. 383; *Mitchell v. Donovan,* 398 U.S. 427; *Rockefeller v. Catholic Medical Center of Brooklyn and Queens, Inc.,* 397 U.S. 820; see also, *Roe v. Wade,* 410 U.S. 113, 123.

In the light of the foregoing, the Appellees submit that the motion to dismiss the appeal upon the ground that the appeal is not within the jurisdiction of the Court should be granted.

3. In the alternative, the judgment of the District Court, as amended, was clearly correct in all respects. The essentially undisputed facts established that in the two days after Appellees commenced exhibiting the film in question at their theatre, Appellants seized in succession four copies of the film and all cash receipts at the theatre. The four seizures were made pursuant to search warrants issued *ex parte,* prior to any judicial determination in an adversary proceeding that the film was obscene.[1] Immediately following the last of the four seizures, the theatre ceased exhibition of the film in question. Appellants never have contended that four copies of the film were necessary as evidence in the single state misdemeanor prosecution arising out of ex-

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[1]The adversary hearing regarding the alleged obscenity of the film to which Appellants refer in their Jurisdictional Statement, occurred only after the multiple seizures of the film. See, *Quantity of Copies of Books v. Kansas,* 378 U.S. 205; *Marcus v. Search Warrants of Property,* 367 U.S. 717.

hibition of the film. Nor have Appellants ever sought to justify seizure of all cash receipts from the theatre. The massive seizures, prior to a judicial determination of obscenity in an adversary proceeding, were undertaken in clear violation of this Court's ruling in *Heller v. New York,* 413 U.S. 483. The District Court was manifestly correct in concluding that "the pattern of seizures of the plaintiffs' cash receipts and films demonstrate that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively exercise the movie 'Deep Throat' out of Buena Park." [Appendix "A" to Appellants' Jurisdictional Statement, p. 18]. Such conduct, the District Court found, constituted law enforcement undertaken in bad faith for the purpose of harassing Appellees in the exercise of their freedom of speech and press.

The judgment of the District Court, as amended September 30, 1974, appropriately ordered Appellants to petition the state court to return to Appellees three of the four seized copies of the film, the cash receipts previously having been returned by means of a similar petition. Since it was stipulated that all four copies of the film were identical, and that only one copy was necessary as evidence in the state criminal prosecution, the District Court's amended judgment granted appropriate relief in the light of *Heller v. New York, supra,* while refraining from terminating or disrupting the state criminal prosecution. See, *Cinema Classics, Ltd. v. Busch,* 339 F.Supp. 43 (C.D. Cal. 1972), affrmd. 409 U.S. 807.

4. Appellees submit further that the District Court was correct in entering a declaratory judgment that the California obscenity statutes, Penal Code §§311

and 311.2, are unconstitutional in the light of this Court's decision in *Miller v. California,* 413 U.S. 15.[2]

The California obscenity statutes, it is conceded, do not specifically define any physical sexual conduct allegedly subject to regulation. On their face, the state statutes proscribe only expression. In this Court's decision in *Miller v. California,* 413 U.S. 15, the Court made clear that state statutes designed to regulate obscene materials must be carefully limited. The permissible scope of such regulation must be limited to works which depict or describe sexual conduct. "That conduct must be specifically defined by the applicable state law, as written or authoritatively construed." (413 U.S. at 23-24). The Court emphasized that under "the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice" (413 U.S. at 27). "Prerequisite" is defined as something that is "required beforehand; necessary as a preliminary condition." Webster's Third New International Dictionary, Unabridged (G.&C. Merriam Co., 1967).

Since the California obscenity statutes are not on their face limited to specifically defined sexual conduct, the issue presented is whether the statutes as construed

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[2]Threshold questions relating to the equitable principles expressed in *Younger v. Harris,* 401 U.S. 37 and *Samuels v. Mackell,* 401 U.S. 66, and the doctrine of abstention are discussed in detail in the District Court's Memorandum Opinion [Appendix "A" to Appellants' Jurisdictional Statement] and in the District Court's Supplemental Memorandum Opinion [Appendix "A" hereto]. Appellees respectfully adopt the District Court's discussion of these issues.

satisfy the criteria of *Miller*. Following this Court's decision in *Miller*, a California Court of Appeal impliedly conceded that the statute as written does not meet the *Miller* test, but nevertheless stated that the statute had been authoritatively construed in the past so as to limit its reach to specifically defined sexual conduct. *People v. Enskat*, 33 Cal.App.3d 900, 109 Cal.Rptr. 433 (1973) (hearing denied by the California Supreme Court, October 24, 1973) (cert. denied 94 S.Ct. 3225). In its Memorandum Opinion, the court below analyzed the *Enskat* decision and reached the contrary conclusion that no California appellate court ever had authoritatively construed the state obscenity statutes to confine their ambit only to specifically defined kinds of sexual conduct [Appendix "A" to Jurisdictional Statement, pp. 12-15]. Moreover, the *Enskat* decision itself did not even purport to read into the state obscenity statutes as a limitation the examples of specific sexual conduct referred to by this Court in *Miller* (413 U.S. at 25), nor any similar definitions. In its Supplemental Memorandum Opinion, the District Court noted that in *Hamling v. United States*, 94 S.Ct. 2887, this Court upheld the constitutionality of a federal obscenity statute by construing that statute so as to limit its reach to the examples of specific sexual conduct given by *Miller*. As the court below noted, the California appellate court in *People v. Enskat, supra*, rendered no such authoritative construction of the California obscenity statute [Appendix "A", pp. 5-6].

Accordingly, because the California obscenity statutes on their face do not proscribe only sexual conduct defined with specificity, and because the California appellate courts never have placed a satisfactory judicial gloss upon the statutes, the District Court correctly concluded that the statutes do not provide fair notice of what conduct is within their ambit, and thus do not satisfy the First and Fourteenth Amendment standards laid down by this Court in *Miller*.

Conclusion.

Wherefore, Appellees respectfully move the Court to dismiss the appeal herein on the ground that the appeal is not within the jurisdiction of this Court because not taken in conformity to statute or rules of the Court, or, in the alternative, to affirm the judgment of the District Court, as amended on September 30, 1974, on the ground that the said judgment was clearly correct and that it is manifest under the record here presented that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Respectfully submitted,

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APPENDIX "A."

Supplemental Memorandum Opinion.

United States District Court, Central District of California.

Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, v. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. No. 73-2775-F.

Filed: Sept. 30, 1974.

Before Honorable Walter Ely, Circuit Judge, Honorable William G. East, and Honorable Warren J. Ferguson, District Judges.

The defendants have filed appropriate motions to amend the judgment in this case which was filed June 4, 1974.

They allege that: (1) this court was factually in error when it held that the plaintiffs were not defendants in a criminal prosecution; (2) the judgment is contrary to the holding of the Supreme Court in *Hamling v. United States*, ... U.S. ...., 42 U.S.L.W. 5035 (U.S. June 24, 1974); and (3) the injunctive part of the judgment should be modified because (a) the money seized has been returned to the plaintiffs and (b) the films are under the custody of the Municipal Court which is not a party to these proceedings.

I

The first issue is one of serious consequence, for it goes to the heart of the court's reasoning on the issue of abstention. The court bottomed its decision on the abstention issue on the fact that no criminal proceedings had been instituted in state court against the plaintiffs by the date on which they filed their complaint in this court.

The evidence submitted by the defendants here reveals the following:

1. On the date of the filing of the complaint in this case, November 29, 1973, there was pending in the state municipal court an 8-count misdemeanor complaint against Edward Lee Bailey and James Samuel Lytell in connection with the exhibition of "Deep Throat" in Buena Park.

2. Copies of that complaint were furnished this court on December 3, 1973.

3. Neither Mr. Bailey nor Mr. Lytell are parties to this action.

4. The complaint in this action was served upon the District Attorney of Orange County by a deputy United States marshal on January 14, 1974; the other defendants had been served a few days before.

5. On January 15, 1974, a day after that service, the criminal complaint in the state municipal court was amended by the District Attorney of Orange County to include Vincent Miranda and Walnut Properties, Inc., plaintiffs in this action.

6. The defendants rely on the amended state criminal complaint and urge abstention.

The operation of the abstention doctrine when criminal charges are pending is outlined in a trilogy of

cases decided in 1971: *Younger v. Harris,* 401 U.S. 37 (1971); *Samuels v. Mackell,* 401 U.S. 66 (1971); and *Perez v. Ledesma,* 401 U.S. 82 (1971). In each of those cases, a criminal indictment or information had been filed against the plaintiff *before* a complaint was filed in the federal district court. When no criminal charge is pending, however, the case is governed by the doctrine of *Steffel v. Thompson,* .... U.S. ...., 42 U.S.L.W. 4357 (U.S. March 19, 1974). There, the Court noted:

> When no state criminal proceeding is pending at the time the federal complaint is *filed,* federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system. . . . 42 U.S.L.W. at 4360 (emphasis added)

It is clear that for purposes of the abstention doctrine, a determination of whether there is an "ongoing state criminal prosecution" against the plaintiff is measured as of the time of the filing of the complaint in federal court. The fact that the defendants filed criminal charges against the plaintiff after the instant case was under consideration does not alter this court's duty to decide the controversy before it.

Furthermore, the later criminal charges would seem to supply added justification for action by the court. The Chief Justice, in a recent and extensive separate opinion, commented about the burdens and possible ramifications of *Younger v. Harris.* See *Allee v. Medrano,* 42 U.S.L.W. 4736 (U.S. May 20, 1974) (Burger, C. J., concurring in part and dissenting in part.) He there noted that inferences of bad faith can arise from the common activity of the prosecutors and the

police, inferences that the state may have had reasons for bringing a prosecution other than an expectation of securing a valid conviction. While the strict requirements of *Younger* are only of tangential relevance to the prior opinion of this court, the evidence brought to light by the petition for rehearing only serves to strengthen the previous finding of bad faith and harassment. Reasonable people could certainly infer prosecutorial misconduct from the course of action revealed in the latest petition.

No explanation is given why criminal charges were not instituted against the plaintiffs here until after the filing and service of the complaint in this action. Without such an explanation it is reasonable for the court to conclude that the institution of the criminal proceedings was in retaliation for the attempt by plaintiffs to have their constitutional rights judicially determined in this court. That conclusion surely removes this case from the abstention doctrine of *Younger* and *Mackell*.

II

Defendants have requested that this court reconsider its holding in light of the recent decision of the Supreme Court in *Hamling v. United States*, ... U.S. ...., 42 U.S.L.W. 5035 (U.S. June 24, 1974). There, the Court upheld the constitutionality of a *federal* statute which prohibits the mailing of obscene matter, holding that the statutory language as construed met the specificity test of *Miller v. Caliornia*, 413 U.S. 15 (1973). More exactly, Justice Rehnquist referred to footnote 7 of *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 130 (1973) as authority for the construction the Court offered in *Hamling;* i.e., that the terms

"obscene", etc., include the specific "hard-core" matter as described in *Miller* at 25:

> "(a) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

See 42 U.S.L.W. at 5043. That such a construction would be possible was noted by this court in its original opinion; there is nothing in *Hamling v. United States* to suggest that the Supreme Court there did anything more than exercise its authority to construe federal statutes, an authority alluded to in that same footnote 7 of *12 200-ft. Reels.* See *United States v. Thirty-seven Photographs,* 402 U.S. 363 (1971); compare the dissenting opinion of Black, J., *id.* at 384.

More importantly, there is nothing in *Hamling* which would lead this court to believe that the specificity requirements of *Miller* have been overruled. The tenets of *Miller* have not been met, either by the California statute on its face or as construed, either pre-*Miller* or in *Enskat*. There has been no construction by the California courts of an obscenity standard based upon specific acts, nor any formulation comparable to that added to the federal statute in *Hamling*. The Supreme Court in *Hamling*, in fact, points out in detail the infirmity of *Enskat*. In *Hamling* the Court set forth with regard to the federal statute a specific jury instruction which meets the specificity test of *Miller*. However, no such specific instruction is found in *Enskat*, nor can one be inferred. Nothing in that opinion contains language from which an instruction to a jury could be

drawn as to what specific conduct may be constitutionally proscribed.

This court is also faced with the recent dismissal by the Supreme Court of *Miller v. California,* ..... U.S. ....., 42 U.S.L.W. 3711 (U.S. July 25, 1974) (Miller II), "for want of a substantial federal question." When *Miller v. California,* 413 U.S. 15 (1973) (Miller I) was decided in the 1973 term of the Court, the case itself was remanded to the state courts in light of the new obscenity standards developed therein. Upon remand, the case was reaffirmed by the Appellate Department of the California Superior Court of Orange County with the following notation: "affirmed, *People v. Enskat* (1973) 33 Cal.App. 3d 900". *People v. Enskat* was docketed with the Supreme Court *sub nom. Enskat v. California;* the writ of certiorari in that discretionary appeal was denied. 42 U.S.L.W. 3712 (U.S. July 25, 1974).

Enskat is the case discussed and analyzed in the original opinion in this case. The denial of the writ of certiorari in that case does not operate as a decision on the merits. See *Polites v. United States,* 364 U.S. 426, 433 n. 9 (1960); *United States v. Shubert,* 348 U.S. 222, 228 n. 10 (1955). The appeal in *Miller,* however, was taken under 28 U.S.C. § 1257(e) as an appeal of right. This court must now ascertain whether the summary action in Miller II operates as a decision on the merits of the challenge to the constitutionality of the California obscenity statute.

The question is one which has led to commentary by many of this country's preeminent Federal Jurisdiction and Constitutional Law scholars. Professor Bickel would characterize a dismissal for lack of a substantial federal question as a refusal by the Court to exercise its jurisdiction; a reflection of pragmatic considerations and institutional expediency, but not necessarily a decision on the merits. A. Bickel, *The Least Dangerous Branch* (1962). Professor Wechsler, however, feels that the Court should not have the option to decide or reject those cases before it on appeal as of right. H. Wechsler, *Towards Neutral Principles of Constitutional Law* (1961). Professor Gunther sides with the antidiscretion forces, terming those instances in which the Court has clearly ducked a substantial federal question as "aberrations." Gunther, *The Subtle Vice of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review,* 64 Colum. L. Rev. 1, 12 (1964).

Defendants have mistakenly asserted that Justice Brennan's separate opinion in *Ohio ex rel. Eaton v. Price,* 360 U.S. 246 (1959) forecloses the question and definitely establishes that such a dismissal is on the merits. Justice Brennan was not there speaking for the Court, which itself had done no more than note probable jurisdiction of the case on the basis of a 4-4 vote. Rather, he was expressing his personal displeasure at the decision of four of his colleagues to make known the reason for their votes against noting jurisdiction. His statement were, therefore, no more than one justice's passing comments on an issue not before the Court.

It should be noted tangentially that quite a different issue arises when, after deliberation, the Court affirms a decision below by a 4-4 vote, as happened after oral argument in the *Eaton* case. 364 U.S. 263 (1960). Because of lack of agreement by a majority of the Court, many people, including Justice Brennan, feel that such affirmances, while binding on the parties, have no

value as precedent. See 364 U.S. at 264; *United States v. Pink,* 315 U.S. 203, 216 (1942); *Hertz v. Woodman,* 218 U.S. 205, 212-14 (1910).

Thus this court can do no more than take note of Justice Brennan's statement on the dismissal question, and perhaps contrast it with the apparent thrust of Justice Harlan's dissent in *Redrup v. New York,* 386 U.S. 767, 771 (1967) at 772, in which he seemed to embrace the Bickel view and equate dismissal of a writ of certiorari as improvidently granted with a dismissal of an appeal for want of a substantial federal question. More recently, Justice Rehnquist, writing for the Court in *Edelman v. Jordan,* 94 S. Ct. 1347, 1359-60 (1974), suggested that a summary affirmance would carry less weight as precedent than a written affirmance after deliberation. See *Jordan v. Gilligan,* .... F.2d .... (No. 73-1973) (7th Cir. July 19, 1973).

The Courts in several circuits have been confronted with the problem: see, for example, *Ahern v. Murphy,* 457 F.2d 363 (7th Cir. 1972); *Hall v. Thornton,* 445 F.2d 834 (4th Cir. 1971); *Heaney v. Allen,* 425 F.2d 869 (2nd Cir. 1970); *Cross v. Bruning,* 413 F.2d 678 (9th Cir. 1969); *Port Authority Bondholders Protection Committee v. Port of New York Authority,* 387 F.2d 259 (2nd Cir. 1967). Uniformly those courts have held that they will not themselves hear a question the Supreme Court has previously branded as "insubstantial." Two of these courts relied in part on Justice Brennan's opinion in *Eaton,* supra, giving it what this court has discussed above as erroneous precedential value. See 457 F.2d at 364; 445 F.2d at 835. A widely cited student law review article, however, has criticized the *Port Authority* decision, pointing out that the prase "want of a substantial federal question" can have several meanings, not all of which should foreclose another federal court from exercising jurisdiction: "Where the Court was presented for the first time with a nonfrivolous federal claim, and dismissed it summarily, it would be excessively harsh to hold that no lower federal court could thenceforth rule in favor of the argument advanced." Comment, *The Significance of Dismissals "For Want of a Substantial Federal Question": Original Sin in the Federal Courts,* 68 Colum. L. Rev. 785, 791 (1968).

The highly speculative nature of lower court pronouncements about the import of Supreme Court summary procedures is made evident even in Judge Friendly's opinion in *Port Authority,* 387 F.2d at 262 n. 3; therefore it seems to this court safe to say that there is at least equal merit in a position opposite to that taken in the cases discussed above.

It is apparent that only the Supreme Court itself can resolve the dilemma. When this court considered the problem of the constitutionality of the California obscenity statute and the construction rendered by the state court in *Enskat,* there was certainly a substantial federal question presented. Since the summary treatment of Miller II upon remand is inextricably tied to *Enskat,* a case in which there was merely a denial of certiorari, this court cannot attach plenary precedential value to the summary treatment. There have been no doctrinal changes in the time between the original decision here and this petition for rehearing which should alter the previous determination.

III

All parties concede that the money seized from the theater has now been returned, and therefore it is proper that that requirement be eliminated from the judgment of June 4, 1974.

With reference to the return of the four films, the evidence presented to this court shows the following:

1. On January 29, 1974 at pre-trial hearings in the state municipal court, the Assistant District Attorney of Orange County stipulated that all four of the prints seized were identical. That stipulation was accepted by defense counsel. The court stated "the stipulation will be received."

2. The Assistant District Attorney stated that "Well, I think we're trying to resolve the problem in a practical fashion, Your Honor—It's not our desire to have to show more than one of those films at the time of trial if we can avoid it."

3. Plaintiffs' counsel have stated that they wish to honor that stipulation and therefore do not oppose the state officials' retaining one copy of the film.

Technically the defendants may be correct in saying that they have no power to return the film since it is in the custody of the Municipal Court. However, there was apparently little or no difficulty encountered by anyone involved in returning to the plaintiffs their money. At the January 29th proceeding in the Municipal Court, the Assistant District Attorney stipulated with defense counsel that the money would be returned to the plaintiffs here on their agreement that the police could make copies of the bills and cash and that the copies could then be admitted at trial. The Municipal Court judge agreed that "the stipulation will be received as stated." The money was thereupon returned.

It appears that there should be no difficulty whatsoever in following a similar approach in returning three of the films to the plaintiffs. If that transaction will require petitioning the state court to release the films, the burden is upon the defendants to so petition.

Paragraph *two* of the judgment of this court will be amended to read as follows:

> 2. The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of the four film prints seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park.

Except as the judgment will be so modified, the motions of the defendants are denied.

Dated this 30 day of September, 1974.

/s/ Walter Ely
WALTER ELY
United States Circuit Judge

/s/ William G. East
WILLIAM G. EAST
United States District Judge

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

APPENDIX "B."

Amendment to Judgment.

United States District Court, Central District of California.

Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, v. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. Civil No. 73-2775-F.

Filed: September 30, 1974.

Before Honorable Walter Ely, Circuit Judge, Honorable William G. East, and Honorable Warren J. Ferguson, District Judges.

The court having heretofore issued its Supplemental Memorandum Opinion, said opinion constituting its findings of fact and conclusions of law in accordance with the provisions of Rule 52(a) of the Federal Rules of Civil Procedure,

IT IS DECREED as follows:

1. Paragraph *two* of the judgment of this court filed June 4, 1974 in this proceeding is amended to read as follws:

> 2. The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of

the four film prints seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park.

Dated this 30th day of September, 1974.

/s/ Walter Ely
WALTER ELY
United States Circuit Judge

/s/ William G. East
WILLIAM G. EAST
United States District Judge

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge